HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI
AND
HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY

Writ Petition No.15666 of 2007

Between:

Shaik Abdul Haque

… Petitioner

And

Union of India and others.

… Respondents

:: ORDER::

Counsel for the Petitioner: Shri Shaikh Abdul Haque
Petitioner in person

July 24, 2007

Per G.S. Singhvi, CJ

Having failed to convince this Court and the Supreme Court to interfere with order dated 3.12.2004 passed by Family Court, Nampally, Hyderabad under Section 125 of the Code of Criminal Procedure, 1973 (for short, "CrPC'), whereby he was directed to pay maintenance @ Rs.2,000/- p.m. to his minor daughter Farheen Sultana, the petitioner has filed this petition under Article 226 of the Constitution of India for striking down Clauses (a), (b), (c) and (d) of that section.

The petitioner was married to Durdana Quaiser on 6.3.1989. A female child was born to them on 21.8.1992. She was named Farheen Sultana. On 8.7.2000, the petitioner divorced his wife by pronouncing customary talaq and got re-married. In September, 2003, an application was filed by the minor child through her mother and natural guardian – Durdana Quaiser under Section 125 CrPC for grant of maintenance @ Rs.5,000/- p.m.. It was asserting that the petitioner herein is working as Scientist in DRDL, Hyderabad and is getting salary of Rs.25,000/- p.m. and that he is duty-bound to maintain the minor child. The same was registered as M.C.No.193 of 2003. The petitioner contested the application. He pleaded that he alone is not liable to maintain the child and the mother, who is also employed in the Postal Department and is in receipt of salary of Rs.15,000/- p.m., is equally liable to maintain the child. He also averred that the child and her mother were residing in his house and he was paying for the educational expenses and other necessities of the minor.

By an order dated 3.12.2004, Family Court, Hyderabad directed the petitioner to pay maintenance to the child @ Rs.2,000/- p.m. from

the date of application i.e. 19.9.2003 till the date of her marriage. The operative part of that order reads as under:

"In the result, the petition is allowed and the respondent is directed to pay maintenance to the petitioner Rs.2,000/- per month from the date of the application i.e. 19.9.2003 till the date of her marriage. The mother of the petitioner is directed to open a savings bank account any nationalized bank of her choice and inform the same to the respondent. The respondent is directed to deposit the arrears of maintenance and regular maintenance in the said account of the mother of the petitioner. The respondent is also directed to deposit the regular maintenance in the said account of the mother of the petitioner on or before 10th of every month."

Revision Petition No.389 of 2005 filed by the petitioner was dismissed by this Court and petition for Special Leave to Appeal was dismissed by the Supreme Court on 12.8.2005.

After almost two years, the petitioner filed this petition for striking down Section 125 CrPC on the ground that the same is discriminatory and violative of the doctrine of equality enshrined in Articles 14 and 15 (1) of the Constitution of India.

Shri Shaikh Abdul Haque, who appeared in person, argued that Section 125 CrPC is liable to be declared as discriminatory and struck down because it casts an obligation only on the male spouse to support the female spouse, minor children and parents and no liability is contemplated on the female spouse. He referred to the provision contained in Section 20 of the Hindu Adoption and Maintenance Act, 1956 and submitted that the exclusion of female spouse from the liability criteria enshrined in Section 125 CrPC is liable to be declared unconstitutional.

We have considered the submission of the petitioner, but have not felt persuaded to agree with him. Section 125 CrPC, the

constitutionality of which is under challenge reads as under:

"**125.Order for maintenance of wives, children and parents:**

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means.

Explanation.- For the purposes of this Chapter, -

(a) "minor" means a person who, under the provisions of the Indian Majority Act, 1875(9 of 1875) is deemed not to have attained his majority;

(b) "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to

levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is a just ground for so doing.

Explanation.- If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

Although a reading of the plain language of the above re-produced provision gives an impression that only the male spouse is liable to maintain the wife, legitimate or illegitimate minor child and parents, who are unable to maintain themselves, if the said provision is read with the provisions contained in Section 2 (y) of CrPC, Sections 10 and 11 of the Indian Penal Code and the General Clauses Act, it is quite possible to hold that even earning female partner of married couple is liable to maintain the child and the parents, who are unable to maintain themselves. However, we do not consider it necessary to pronounce on the constitutionality of the provision because the petitioner cannot get any substantive relief by grant of a mere declaration that Section 125 is unconstitutional and it is settled law that in exercise of power under Article 226 of the

Constitution of India the High Court will not grant a declaration simplicitor.

With the above observation, the writ petition is dismissed leaving the question of constitutionality of Section 125 CrPC open to be challenged.

G.S. SINGHVI, CJ

C.V. NAGARJUNA REDDY, J

July 24, 2007

svs